

7-4-2017

The EO Stay: The Government Doubles Down on Excluding Grandparents and Refugees

Peter Margulies

Roger Williams University School of Law, pmargulies@rwu.edu

Follow this and additional works at: http://docs.rwu.edu/law_fac_fs



Part of the [Immigration Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Peter Margulies, The EO Stay: The Government Doubles Down on Excluding Grandparents and Refugees, *Lawfare* (July 4, 2017, 1:56 PM), <https://www.lawfareblog.com/eo-stay-government-doubles-down-excluding-grandparents-and-refugees>

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

The EO Stay: The Government Doubles Down on Excluding Grandparents and Refugees

By **Peter Margulies** Tuesday, July 4, 2017, 1:56 PM

The government's latest filing in Hawaii's challenge to President Trump's revised refugee Executive Order (EO) argues that both U.S. grandparents and approved refugee resettlement agencies lack the "bona fide relationship" with noncitizens contemplated by last week's per curiam Supreme Court order. On both counts, the government reads the Court's stay order too narrowly.

In an earlier post, I explained why the government's stance on grandparents and grandchildren did not further either the government's stated national security concerns or its interest in orderly visa-processing. The government (see brief at p. 12 n.2) acknowledges that, as a practical matter, the issue of the EO's coverage of grandparents will often be inconsequential, since the government agrees that a *parent* is protected by the stay. As the government's brief notes, a "U.S. person's grandmother ... may be covered as the *mother* of a different U.S. person." Since the government's observation is surely correct as a matter of both logic and human biology, that raises the question of why the government is fighting tooth and nail on the grandparenting front. The government *should* receive a measure of deference in dealing with the line-drawing problems associated with implementing the Court's stay. However, particularly given the minimal impact on visa-processing, grandparents should not be excluded.

The government's argument that refugee agencies lack a bona fide relationship with refugees is more consequential and disturbing, because of its adverse impact on the refugee resettlement system that the U.S. has helped to build. To support its argument, the government relies on one isolated aspect of the complex resettlement system and unduly discounts the operative premises of the system as a whole.

The refugee resettlement program has worked for decades because of the close collaboration of the U.S. government and a small group of venerable volunteer refugee agencies ("volags") such as the U.S. Conference of Catholic Bishops (USCCB) and the Lutheran Immigration and Refugee Service (see my post here and Ilya Somin's post here). The government's supporting documents include a declaration by Lawrence Bartlett, a State Department official who exhaustively documents the public-private partnership at the resettlement program's core.

The Bartlett Declaration aptly notes that in the resettlement program, just as with any other effective partnership, each party knows its proper role and the obligations pertaining to that role. It so happens that, pursuant to a volag's assurance to the government that it will provide all requisite resettlement assistance to a particular refugee, the volags' obligations kick into high gear when a refugee enters the United States. The government's brief transforms this mundane point about the refugee resettlement time-line into an "a ha moment" about the nature of the volag's relationship with individual refugees. According to the government, since a volag that provides assurances to the U.S. government prior to the refugee's admission to the U.S. typically does not have "direct contact" with the refugee prior to his or her arrival, the volag prior to arrival lacks the "bona fide relationship" that the Supreme Court's stay requires. However, the government misses the forest for the trees.

The Bartlett Declaration on which the government relies reinforces that the volag's relationship with the refugee starts when the volag tenders its assurance to the government that it will assist in the refugee's resettlement. As the Bartlett Declaration notes (see para. 5), resettlement through the U.S. Refugee Admissions Program (USRAP) is a complex process requiring extensive "coordination" between the government, international organizations, and volags. The government's decision to grant an individual refugee status takes "between 18 and 24 months," (para. 7), including security screening (para. 12). Once the government has granted an individual refugee status, it looks to volags such as USCCB to provide a "sponsorship assurance" (para. 16).

As I noted in my earlier post and the Bartlett declaration confirms, this assurance is not a curbside opinion glibly issued and casually revoked. Rather, by tendering a sponsorship assurance, the volag triggers a daunting set of *binding legal obligations* that the State Department comprehensively outlines in exhaustive agreements appended as exhibits to the Bartlett Declaration. For example, the volag undertakes to "arrange for the reception and placement of refugees in the United States," including provision of "basic necessities and core services" and assistance in "achieving economic self-sufficiency through employment as soon as possible." Specifically, the volag must provide "[b]asic needs support for at least 30 days, including the provision of safe, sanitary, and affordable housing; essential furnishings; appropriate food ... necessary clothing ... health screenings ... enrollment in employment services ... assistance registering children in school; and transportation to job interviews and job training." Granted, the volag follows through on those commitments only when the refugee arrives. However, the commitments *arise* when the agency provides a sponsorship assurance.

As the Bartlett Declaration makes clear, there's *nothing* glib or casual about the agreements volags make as part of their sponsorship assurance. Rather, each volag binds itself legally to ensuring a refugee's welfare upon arrival in the United States. Just as importantly, the volag's ability to keep its promises grounds its reputation as a repeat player in the complex resettlement process. (As largely faith-based

groups, the volags are also subject to a higher authority, but I won't dwell on that here.) In short, in assessing what counts as a "bona fide relationship," the volag's binding obligations and stake in successful resettlement should count far more than the mere timing of its service delivery.

The government also gestures at but doesn't really make a "floodgates" argument, observing that volags' combined sponsorship assurances now cover over 23,000 refugees. However, this argument is a red herring. As the government acknowledges (p. 18), in the ordinary (pre-EO) course of refugee resettlement, many of these individuals would not enter the U.S. within the next 120 days (the EO's duration for refugees, which should run its course at around the time the Supreme Court hears argument on the case this Fall). The Supreme Court's stay does not speed up ordinary visa processing. Therefore, the real number of stay beneficiaries includes only those refugees who would be admitted as ordinary refugee resettlement takes its course.

Perhaps the government is saying that viewing the volags' assurances as meeting the bona fide relationship test will result in the admission of a substantial number of individuals already granted refugee status, and will thus tilt the stay's implementation toward the EO's challengers. According to the government, accepting the volags' view would render the stay "largely inoperative." However, this argument is misplaced. The Court's stay expressly ordered that ordinary processing resume for refugees with a bona fide relationship to a U.S. "entity." For refugees, that entity could only be the refugee agency that assumes virtually complete responsibility for every particular of the refugee's life in the United States immediately after the refugee's arrival.

Shutting out those agencies, as the government advocates, would certainly gut the Court's order. The best guide to compliance with the stay is the stay's own language and logic. Acknowledging the interdependence between a volag's assurances and a refugee's successful resettlement vindicates that logic. In contrast, the government's position ignores the vital role of volags in resettling refugees and thus undermines the stay's rationale.

Topics: Travel Ban

Tags: Executive Order 13780, Travel Ban, grandparents, refugees, visa-processing, bona fide relationship

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).